

**Transport Service Co. and Thomas McClain and Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO and James DeMoss.**  
Cases 13-CA-26615, 13-CA-26859, and 13-CA-26892

March 11, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On May 16, 1989, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

We agree with the judge that the Respondent lawfully denied the Union access to its premises on February 17, 1987.<sup>3</sup> However, we do not agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by denying the Union access to the Respondent's premises from on or about April 20. The judge relied on an April 20 position letter sent by the Respondent's attorney to the Regional Office

that stated in part, "[t]he Company does not believe the union represents a majority of its employees in an appropriate unit and thus has no obligation . . . to permit this union onto its premises."<sup>4</sup> As the judge previously found the Respondent was obligated to continue to recognize and bargain with the Union, the judge concluded that the Respondent had no justification to deny the Union access to its premises.

The Respondent excepts to this finding, arguing that the Union did not request access to its premises subsequent to February 17, that the Respondent did not refuse the Union access since February 17, and that the Respondent was never charged with denying the Union access since February 17. The Respondent also argues that its April 20 position letter was written to refute the Union's charge that it unlawfully denied the Union access on February 17 and that the judge found the Respondent's February 17 denial of access to be lawful.

We find merit in the Respondent's exceptions. The complaint does not allege the Respondent refused the Union access on or since April 20, and such refusal was not litigated at the hearing. There is also no evidence that the Union requested access to the Respondent's premises since February 17, nor was there evidence that the Respondent's position letter of April 20 was ever communicated to the Union. In sum, the violation the judge found was not alleged, litigated, or proven. We therefore reverse the judge's finding that the Respondent violated Section 8(a)(5) by its April 20 letter.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 7 and renumber the subsequent conclusions of law.

ORDER

The National Labor Relations Board orders that the Respondent, Transport Service Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) as the exclusive collective-bargaining representative of its employees in the appropriate unit.

(b) Failing and refusing to bargain collectively with the Union by unilaterally ceasing to make contributions into the Union's pension, health and welfare funds on behalf of certain employees who continued to work during the strike.

(c) Failing and refusing to furnish, on request, relevant information to the Union.

<sup>1</sup> Unlike our dissenting colleague, we agree with the judge's finding that the Respondent's January 9, 1987 commitment to hire Juan Garibay, in addition to two other individuals, was an offer of permanent employment. Pursuant to its normal hiring procedure, the Respondent required Garibay and the other new employees to pass a physical, a polygraph test, and a motor vehicle records check. Only Garibay, of the three new hires, had not completed his tests by the Union's January 13, 1987 offer on behalf of strikers to return to work. For the reasons stated in our decision in *Solar Turbines*, 302 NLRB 14, issued today, we find that the Respondent's routine requirement of some posthire testing did not convert its commitment to Garibay into something less than an offer of permanent employment. Accordingly, we conclude Garibay was a permanent striker replacement as of January 9, 1987.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The judge recommended a broad cease-and-desist order against the Respondent based on his finding, inter alia, that the Respondent's withdrawal of union recognition was not grounded in good faith and that the Respondent engaged in misconduct including a failure to reinstate strikers. Although we agree with the judge that the Respondent has violated the Act, we do not agree that a broad order is necessary here. A broad order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1979). Contrary to the judge, we do not believe the Respondent's conduct warrants such a finding. Accordingly, we shall modify the judge's recommended Order and shall issue a new notice to employees.

<sup>3</sup> All dates are 1987 unless indicated.

<sup>4</sup> The Respondent's position letter responded to a set of charges filed by the Union in Case 13-CA-26817.

(d) Failing and refusing to reinstate former striking employees to their former positions or to substantially equivalent positions, if their former positions no longer exist.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described below concerning terms and conditions of employment. The appropriate unit is as follows:

All employees in the bargaining unit, namely Foreman or Head Mechanic, Automobile Machinist, Mechanic, Welder, Painter, Skilled Tireman, Helper, Truck, Tractor and Tank Cleaners and Apprentices coming under the jurisdiction of Automobile Mechanics Local No. 701, IAM and AW, AFL-CIO, 133 S. Ashland Avenue, Chicago, Illinois 60607; but excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) Remit to the Union all contributions it failed to make to the Union's pension, health and welfare funds on behalf of prestrike employees who continued to work during the strike as provided in the remedy section of the judge's decision and make these employees whole for any losses attributable to its failure to make the contribution as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Furnish the Union, on request, all relevant information including the names and addresses of all unit employees and information pertaining to the Company's insurance, hospital, and pension plans, and copies of those plans.

(d) Offer Thomas McClain, Ron Golden, and Paul Anderson immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired after January 13, 1987, and make them whole as well as Roosevelt Carter and James DeMoss for any loss of pay by reasons of its refusal to timely reinstate them in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those portions of the consolidated complaint and amendments that were found to be without merit are dismissed.

MEMBER DEVANEY, dissenting.

For the reasons set forth at greater length in my dissent in *Solar Turbines*, 302 NLRB No. 3, issued this day, I find, contrary to my colleagues and the judge, that the Respondent had not hired Juan Garibay as a permanent striker replacement at the time the strike ended and the Union made its offer to return, so that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate a striker mechanic to the position later occupied by Garibay. In my view, the Respondent's offer of employment to Garibay was conditional, dependent on his successful completion of the Respondent's screening procedure; as of the time of the offer to return Garibay had not successfully completed the screening procedure and therefore had not removed the conditions placed on that offer. Accordingly, I would find that the reinstatement and backpay ordered to remedy the Respondent's unlawful refusal to reinstate strikers should extend to an additional former striker.<sup>1</sup>

The key facts follow. The Union commenced an economic strike on January 4, 1987.<sup>2</sup> The strike ended on January 13 when the Union offered to return to work on behalf of the striking employees. After initially being informed that three mechanic positions would be available for returning strikers, the Union was informed on January 15 that only one mechanic's position was available because replacements had been

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of The National Labor Relations Board" shall read "Posted Pursuant to a Judgment of The United States Court of Appeals Enforcing an Order of The National Labor Relations Board."

<sup>1</sup> There are no exceptions to the judge's finding that, like Garibay, J. Koonce was also hired as a permanent replacement so I adopt that finding pro forma in the absence of exceptions. I agree with the balance of my colleagues' findings on the other unfair labor practice allegations.

<sup>2</sup> Unless otherwise noted, all subsequent dates are in 1987.

hired before the strike ended; however, the replacements could not start work until they had passed a physical, a polygraph test, and a motor vehicle records check. Garibay, a mechanic, applied for a position as a replacement on January 9 and was scheduled for the various tests required by the Respondent. However, he did not start work until January 19, 6 days after the Union's offer to return. He did not complete the physical required by the Respondent until January 14, the day after the strikers' offer to return. Thus, the strikers' offer to return to work interrupted his preemployment screening, and, at the time the strike ended, Garibay was not free to begin work.

The judge stated the standard applicable here: "if the employer makes a commitment to the applicant for a striker's job, we will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work," quoting *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971) (citations omitted). My disagreement with the judge and with my colleagues goes to the quality of the commitment made to Garibay by the Respondent. In my view, Garibay did not have a firm offer of employment—one that he could "take to the bank" and act on by actually beginning to work—until he had completed the conditions imposed by the Respondent. The facts plainly show that successful completion of the preemployment testing was required to obtain a job with the Respondent, and that Garibay's failure to submit to the tests, or their yielding unsatisfactory results, would have meant that he would not be hired. As I have explained more fully in my dissent in *Solar Turbines*, supra, in which an employer requires applicants to fulfill certain requirements, such as physical or drug tests as a condition of hire, a firm commitment to hire occurs only when the applicant has successfully completed the requirements and the employer has received the results, so that the applicant is free to begin work. In this case, as in *Solar Turbines*, it is plain that the applicant at issue could not start work until he had removed the conditions imposed by the Respondent. Garibay's efforts to remove these conditions were interrupted by the strikers' offer to return. Thus, in my view, he was not hired as a permanent replacement before the end of the strike, and the Respondent has not carried its burden of demonstrating that the mechanics' position that Garibay occupied after January 19 was unavailable when the Union ended the strike.<sup>3</sup> I therefore dissent.

<sup>3</sup> My colleagues refer to the physical examination, polygraph test, and motor vehicle records check required of applicants for employment by the Respondent as "some posthire testing." Their choice of terminology begs the question. By simply characterizing the testing as "posthire," my colleagues permit the employer asserting that a striker's position is not available to avoid its proper burden of showing that a firm commitment to hire a replacement predated the offer to return. By contrast, I maintain, as I did in *Solar Turbines*, supra, that when an employer decisively conditions a job offer on meeting certain requirements, the Board must analyze the nature of the employer's commitment to

the employee to determine whether the offer satisfies the Board's standards for replacement status.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO as the exclusive representative of the employees in the bargaining unit. The bargaining unit is:

All employees in the bargaining unit, namely Foreman or Head Mechanic, Automobile Machinist, Mechanic, Welder, Painter, Skilled Tireman, Helper, Truck, Tractor and Tank Cleaners and Apprentices coming under the jurisdiction of Automobile Mechanics Local No. 701, IAM and AW, AFL-CIO, 133 S. Ashland Avenue, Chicago, Illinois 60607; but excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union by unilaterally ceasing to make contributions to the Union's pension, health and welfare funds on behalf of certain unit employees who continued to work during the strike.

WE WILL NOT refuse to furnish the Union relevant information on request.

WE WILL NOT refuse to reinstate former strikers to their former positions or to substantially equivalent positions if their former positions no longer exist.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively with the Union as the exclusive bargaining representative of our employees in the bargaining unit concerning terms and conditions of employment.

WE WILL make contributions into the Union's pension, health and welfare funds on behalf of certain employees who continued to work during the strike and WE WILL make these employees whole for any losses attributable to our failure to make the contributions, with interest.

WE WILL bargain with the Union by providing it, on request, relevant information, including the names and addresses of all our unit employees and information

pertaining to our insurance, hospital, and pension plan, and copies of those plans.

WE WILL offer Thomas McClain, Ron Golden, and Paul Anderson immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired after January 13, 1987, and WE WILL make them whole as well as Roosevelt Carter and James DeMoss for any loss of earnings by reason of our refusal to timely reinstate them, with interest.

#### TRANSPORT SERVICE CO.

*Douchan Pouritch, Esq.*, for the General Counsel.

*Leonard R. Kofkin, Esq. (Fagel, Haber & Maragos)*, of Chicago, Illinois, for the Respondent.

*J. Peter Dowd, Esq. (Dowd & Resnick)*, of Chicago, Illinois, for the Charging Union.

#### DECISION

##### STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. These consolidated cases were heard in Chicago, Illinois, on May 2, 3, and 4, 1988. The underlying charges in Case 13-CA-26615 were filed by Thomas McClain on January 27, 1987, alleging that Transport Service Co. (the Respondent), violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate him and other former striking employees on their unconditional offer to return to work.

The original charges in Case 13-CA-26859 were filed by Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Charging Union or Union) on May 1, 1987. These charges allege that the Respondent failed to bargain in good faith by, inter alia, making regressive proposals, refusing to provide relevant information on the Union's request, and failure to provide the Union access to employees on the company premises. The Charging Union filed amended charges on May 13, 1987, alleging that the Respondent also unlawfully withdrew recognition from the Union.

The charges in Case 13-CA-26892 were filed by former striking employee James F. DeMoss on May 14, 1987, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate him and other striking employees who had been employed in the same job classification as DeMoss on their unconditional offer to return to work.

The aforementioned charges gave rise to complaints and amended complaints and to an order consolidating cases and setting date for hearing in Cases 13-CA-26615 and 13-CA-26859 dated June 5, 1987, and an order further consolidating cases dated July 1, 1987, to include allegations contained in Case 13-CA-26892. The consolidated complaints were amended further at the hearing to allege that the Respondent violated Section 8(a)(5) of the Act additionally, by hiring strike replacements at higher wages than Respondent's im-

plemented final contract offer to the Union. (Tr. 336.) Still further, counsel for the General Counsel contends that the record supports an additional finding that the Respondent violated Section 8(a)(3) and (5) of the Act by giving a wage increase to an employee to induce him to cross the picket line.

The Respondent filed corresponding answers conceding, inter alia, certain jurisdictional factors, supervisory and agency status of certain individuals, and the appropriateness of the bargaining unit but denying that it committed any unfair labor practices.

#### Issues

The principal issues are:

1. Whether the Respondent failed to recall certain former striking employees in violation of Section 8(a)(3) of the Act.

2. Whether the Respondent violated Section 8(a)(3) and (5) of the Act by giving a wage increase to employee J. McCormack to induce him to cross the picket line.

3. Whether the Respondent violated Section 8(a)(3) and (5) of the Act by hiring replacements during the strike at a wage rate higher than its final contract offer to the Union.

4. Whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the fringe benefits of certain employees without first bargaining with the Union.

5. Whether the Respondent violated Section 8(a)(5) and (1) of the Act by offering regressive and onerous bargaining proposals to the Union.

6. Whether the Respondent unlawfully withdrew recognition from the Union on or about April 20, 1987.

7. Whether the Respondent failed and refused to provide relevant information as requested by the Union in violation of Section 8(a)(5) of the Act.

8. Whether the Respondent denied access to the Union to the Respondent's premises in violation of Section 8(a)(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the posttrial briefs, I find as follows.

#### I. JURISDICTION

The Respondent, Transport Service Co., an Illinois corporation with two facilities in Chicago, Illinois, is engaged in the business of a motor carrier transporting bulk commodities for major chemical and food-grade shippers throughout 48 States. During the past calendar year, in connection with the aforementioned business operations, the Respondent has performed services valued in excess of \$50,000 directly in States other than the State of Illinois. It is admitted, the record supports, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, the record supports, and I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Sequence of Events

#### 1. Prestrike backdrop

The Respondent, a motor carrier, operates 10 terminal locations in eight States. Its Chicago, Illinois terminal is the only facility involved. There, the Respondent's employees have long been represented by three separate unions. The majority of Respondent's approximately 45 unionized drivers are represented by Teamsters Local 705 while other drivers are represented by an independent union, the Chicago Drivers Union, Independent. (The complaint allegations do not relate to any of the drivers.) At the same Chicago location, the Respondent also employs 10 mechanics and utilitymen and 3 tank cleaners (also called washers). These employees have been represented as a separate bargaining unit by the Charging Machinists Union, Local 701 (the Union) since 1946. (This is the only unit encompassed by the pleadings.)

The last collective-bargaining agreement between the Respondent and the Union expired on October 31, 1985 (G.C. Exh. 2). By letter dated August 23, 1985, the Respondent served notice to the Union to terminate the then-existing contract on its expiration and of its willingness to negotiate a new agreement. (Jt. Exh. 1A.) The negotiations for a new contract commenced in the fall of 1985. In large part, the negotiations were carried out by mail (exchange of proposals) rather than directly face to face and continued long after the expiration of the last contract.

The Respondent was seeking, inter alia, reductions in wages, fewer holidays, and fewer and different job classifications. On the other hand, the Union's proposal included increases in personal days, fund contributions, and higher wages. By letter dated December 6, 1985, from the Respondent's chief negotiator Robert Schurer, executive vice president to Edward Wojtczak, the Union's business representative and chief negotiator, Schurer noted, that nothing "constructive" had transpired over many weeks and suggested a face-to-face meeting. (Jt. Exh. 1F.)

The parties conducted bargaining sessions on February 28, and March 6 and 18, 1986. By letter dated March 21, 1986, Schurer presented Respondent's final offer (Jt. Exh. 1K). The offer was rejected by the union membership. Over the next 6 months there was no contact between the Respondent and the Union. While the contract had long terminated, the terms and conditions of that agreement continued to be implemented until late September 1986.

By letter dated September 26, 1986, Schurer notified the Union that the Company's final offer of March 21, 1986, would be implemented "at the start of business on Sunday, September 28, 1986." (Jt. Exh. 1N.) In that letter Schurer noted, inter alia, "[a]fter eleven months of negotiations, it is clear that we can no longer sit by idly in a stalemated position." (Id.) On the same date, the Respondent posted the same information on the unit employees' bulletin boards. (G.C. Exh. 3.)

By letter dated October 6, 1986, Wojtczak informed Schurer that the membership had rejected the implemented final offer and requested that the latter meet with him to discuss the Union's new proposal. (Jt. Exh. 1O.) Schurer met with Wojtczak twice in October and they discussed the implemented offer as well as the Union's new proposal. These

meetings resulted in a revised offer by the Respondent on November 6, 1986, which, inter alia, accepted a number of items contained in the Union's new proposal (Jt. Exh. 1R).

Schurer met with Wojtczak on December 8, 1986, to discuss the Respondent's revised offer. The parties did not move any closer to an agreement on that occasion. That same day, Schurer withdrew his revised offer in a letter to Wojtczak asserting therein that "no progress whatsoever has been made in negotiations" and reinstating the Respondent's final offer of March 21, 1986, which had been implemented on September 28, 1986 (Jt. Exh. 1U). (It is not alleged that the Respondent negotiated in bad faith or otherwise violated the Act at any time through the calendar year 1986.)

#### 2. The strike

At around midnight, Sunday, January 4, 1987,<sup>1</sup> most of the unit employees commenced a union-supported economic strike and established a picket line. At that time there were 13 unit employees including 8 mechanics, 1 utilityman, and 4 washers. One of the washers, H. Phillips, had suffered a prestrike injury and was then out of work on total disability. Phillips has not been replaced and was still out of work on disability at the time of the hearing.

The bargaining unit also included a shop foreman's position which was open at the time the strike commenced and was not filled until March 12 or approximately 3 months after the strike ended. (On March 12, the Respondent hired E. Pietrzak, a new applicant to fill the shop foreman's slot.) Three of the prestrike employees continued to work during the course of the strike: R. Taylor (utility), L. O'Connor (mechanic), and J. McCormack (mechanic). By letter dated January 5, 1987, the Respondent notified the strikers as follows:

Please be advised that unless you return to work immediately, we intend to begin the process of permanently [emphasis added] replacing all mechanics and tank cleaners. [R. Exh. 4.]

Within a few days of the aforementioned letter, the Respondent began interviewing replacements. The strike ended at approximately 3:30 p.m. on January 13. In dispute is whether certain individuals were actually hired as permanent replacements before their starting date and before the strikers unconditionally offered to return to work. (This issue will be treated more fully separately, *infra*.)

#### 3. Poststrike activity

On the morning of Tuesday, January 13, Schurer sent a letter to Wojtczak informing him that Respondent was withdrawing all offers including its final offer made back in 1986 (G.C. Exh. 5). Later that same day, at around 3:30 p.m., Wojtczak telephoned Schurer and told him that the striking employees were unconditionally offering to return to work and that the strike was over. In turn, Schurer informed Wojtczak, that the Respondent had hired permanent replacements but that he, Schurer, was uncertain of the number or how many positions were then available for the returning strikers. According to Schurer, Wojtczak had difficulties understanding the concept of permanent replacements.

<sup>1</sup> All dates hereinafter refer to 1987 unless otherwise indicated.

Wojtczak and Schurer agreed to meet and discuss the matter more fully at the union office on January 15 at 9 a.m. Still that same day and shortly after the telephone conversation, Wojtczak sent Schurer the following telegram:

This is to confirm that on January 13, 1987 all members of Automobile Mechanics Local 701 offered unconditionally to terminate strike and to return to work immediately. Local 701 members have been directed to report at regular starting times notwithstanding your refusal to reinstate any employees. Suggest you reconsider position. Reinstate all employees pending negotiations and avoid unfair labor practice. Also this is to confirm that Local 701 and Company representatives are to meet at 9 a.m. Thursday, January 15, 1987 at Union Hall 533 South Ashland Chicago for negotiations. [G.C. Exh. 6.]

Schurer responded by telegram the same day:

No refusal to reinstate was stated or implied. Issue is only number of employees required due to extent of permanent replacements and method of reinstatement to accommodate permanent replacements. All tank washers have been replaced but three mechanics have not. Please select *three mechanics* [emphasis added] to report to work immediately at commencement of regular shift. Your version of our conversation in which you expressed no real understanding of the permanent replacement issue is incorrect and contrary to fact. I confirm meeting with you at 9:00 a.m. Thursday, January 15, 1987 at your office. [G.C. Exh. 7.]

Schurer testified that after he sent the aforementioned telegram, he learned from his staff that there was only two mechanic slots (working foreman and building maintenance) rather than three such positions. The next morning, January 14, Schurer sent the Union a second telegram stating:

In my haste to accommodate your expected offer late yesterday to return all strikers and respond to your allegations, I misstated the substantial amount of permanent replacement and the availability of work in view of the limited amount of equipment at the terminal during the strike.

I will collect all information for review and discussion at tomorrow's meeting. [G.C. Exh. 8.]

The parties met as agreed at the Union's office on Thursday, January 15. The Respondent was represented by Schurer, Attorney Leonard Kofkin, and Mid-Western Regional Manager Thomas Dennis; the Union by Wojtczak and Attorney J. Peter Dowd. This was the first session attended by Dowd. At this meeting, Kofkin and Dowd were the chief spokesmen for their respective sides. Kofkin told the union representatives that only one slot was available to be filled by the former strikers and that was in building maintenance, a mechanic position. The Respondent conveyed the view that none of the strikers were qualified to handle the working foreman position, assertedly, the only other open slot. According to Dowd, the Union did not take a position. "It was something we needed to look into." As for the building maintenance position, the Company expressed the view that

mechanic Danhoff was the most qualified and although he was not the most senior mechanic, he was designated to fill that slot with the Union's concurrence.

However, at the aforementioned meeting, there was no agreement regarding the status of the so-called permanent replacements, and much confusion. Dowd asked for and was provided the starting date and date of hire of all the replacements. Some of these replacements had not actually begun working until after the strike ended and, in one case, mechanic J. Koonce, did not begin working until Monday, January 19. Kofkin represented to the Union that all the replacements were hired before the strike had ended but explained that starting dates were conditioned on such factors as passing a company physical, polygraph test, and/or a motor vehicle record check. Also, in a few cases, the replacements had to provide some notice to their employers. (As noted previously, the status of the replacements and strikers will be treated more fully infra.) The parties agreed to meet again although no date was set at that time. At the hearing, Dowd acknowledged that Kofkin invited Wojtczak to visit the terminal to "take a look" which the latter did some 20 minutes after the aforementioned meeting ended. (The record is unclear to what extent Wojtczak was able to verify the Respondent's representations when he appeared at the terminal; Wojtczak did not testify.)

By letter dated February 2, 1987, the Respondent advised Wojtczak that it was prepared to meet with him at his convenience. (R. Exh. 8.) A meeting was scheduled for February 17. In connection therewith, Schurer prepared revised contract proposals. (R. Exh. 9.) Kofkin, Schurer, and Dennis attended for the Respondent; the Union was represented by Dowd, Wojtczak, and Tom Altpeter, a new business representative. (Wojtczak was near retirement and Altpeter was expected to assume the former's responsibilities.)

At the February 17 meeting, the Union asked the Respondent to reintroduce its implemented offer of September 1986 rather than to negotiate over the Respondent's new revised proposals. This, the Respondent refused to do. Instead, Schurer and Kofkin presented a revised package which included, inter alia, a 3-year contract to be effective from the date of execution, shorter vacations, fewer holidays, a new company health and insurance plan and eliminating the union plan, eliminating the working foreman from the bargaining unit, and eliminating the checkoff and union-security provisions. The wage levels remained the same as implemented in 1986. (The General Counsel contends that Respondent's revised contract package consisted of regressive proposals which were offered in bad faith in violation of Section 8(a)(5).) Schurer testified without contradiction that each of the items were discussed at this meeting. He also denied that the revised proposals constituted a final offer or that the Respondent indicated an unwillingness to meet and negotiate further.

At the February 17 meeting, the parties also discussed the then-current status of the replacements and strikers. The Company informed the Union that all the employees who were hired as permanent replacements were still employed and that the former unreinstated strikers were on a preferential hiring list. Kofkin noted that the Company had a temporary vacancy for a mechanic and had offered the job to former striker M. Morrissey but the latter declined. The job included some additional fabricating and welding skills.

As such, the Company expressed the view that other than Morrissey, no other mechanic was qualified to perform that particular job and therefore subcontracted the work in question when Morrissey turned down the offer. The Union did not make any counterproposal. Dowd testified, "At that point I had no information about Morrissey's skills or anybody else's."

Before the aforementioned meeting ended, Dowd requested additional information regarding the Company's new pension plan proposal and the names and addresses and phone numbers of the replacements which Kofkin promised to provide. However, Kofkin denied the Union's request to hold a meeting of the replacements at the Respondent's terminal.

In mid-March, Dowd telephoned Kofkin and informed him that the Union had not yet received the requested information. Kofkin told Dowd that he didn't know why that information had not been supplied but he would communicate that to the Company and have someone contact the Union on this subject. The requested information was never furnished. According to Schurer, over the following months there were sufficient factors tending to militate against the Union's majority status. (The factors relied on by Schurer will be noted and discussed more fully *infra*.)

In a position letter dated April 20, 1987, to the Board's Regional Office, Kofkin stated, in pertinent part:

The Company does not believe the Union represents a majority of its employees in an appropriate unit and thus has no obligation to provide the information sought or to permit this union onto its premises. [G.C. Exh. 9.]

It is also alleged that the above position constituted an unlawful withdrawal of recognition in violation of Section 8(a)(5).

### B. Discussion and Conclusions

#### 1. Whether the Respondent failed to recall certain former strikers in violation of Section 8(a)(3)

It is undisputed that an economic strike ended on January 13 at approximately 3:30 p.m. and at that time, the strikers through the Union offered unconditionally to return to work. It has long been settled, that in such circumstances, absent legitimate and substantial business justifications, economic strikers are entitled to immediate reinstatement to their prestrike job unless that position is already filled by a permanent replacement. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970). In such circumstances the employer carries the burden of showing the bona fides of the replacements or other legitimate and substantial justifications. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-379 (1967); see also *J. E. Siegerwald Co.*, 263 NLRB 483, 492 (1982); *Home Insulation Service*, 255 NLRB 311, 312-313 (1981).

Here, it is alleged that since on or about January 14, 1987, the Respondent unlawfully refused to reinstate Roosevelt Carter, Thomas McClain, and Ron Golden, all mechanics, to their former positions. (G.C. Exh. 1(c).) It is also alleged that "[s]ince on or about March 1987," the Respondent unlawfully refused to recall former striking employees James DeMoss, Paul Anderson, and Ephriem Norwood (all em-

ployed as "washers" prior to the strike), "to utilitymen positions for which they are qualified." (G.C. Exh. 1(v).)

With regard to the mechanics in issue,<sup>2</sup> the Respondent contends that at the time they made their unconditional offer to return to work, each of them had already been permanently replaced during the strike. In Carter's case, he was reinstated as a utilityman and when a position subsequently opened for a mechanic, he filled that opening and continues to be so employed. As for McClain and Golden, the Respondent noted that the permanent replacements still occupy these positions.

The Respondent named J. Koonce, J. Garibay, and R. Clark as the permanent replacements hired during the strike. Each of them had submitted their employment application, each had been interviewed, and each were at least scheduled to take their physical and polygraph test before the striking employees offered to return to work (at approximately 3:30 p.m. on January 13). However, Koonce and Garibay did not begin working until January 16 and 19, respectively; Clark commenced working at 7:45 a.m. on January 13.

While there does not appear to be any issue with regard to the bona fides of Clark's replacement status, the parties are in dispute regarding the hiring date and replacement status of Koonce and Garibay. The Board has provided the following guideline: "If the employer makes a *commitment* [emphasis added] to the applicant for a striker's job, we will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement *before* [emphasis added] the replacement actually begins to work." *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), citing *Anderson, Clayton & Co.*, 120 NLRB 1208 (1958); see also *Superior National Bank*, 246 NLRB 721 (1979). Thus, the hiring date turns on whether a commitment to hire was timely made.

In the instant case, I find on the total state of the record and on the basis of *Anderson, Clayton & Co.*, *supra*, and its progeny, that J. Koonce and J. Garibay were hired as permanent replacements (as was Clark) notwithstanding the fact that the starting dates for both of them postdated the offer by the strikers to return to work. First, it is noted that on Monday, January 5 (strike began January 4), the Respondent handed each striker a letter on the picket line stating "that unless you return to work immediately we intend to begin the process of *permanently* [emphasis added] replacing all mechanics and tank cleaners (washers)." (R. Exh. 4.) Compare *Cutting Inc.*, 255 NLRB 534 (1981). (The strikers' return met the employer's specified deadline.)

The record disclosed that the Respondent began carrying out the message of hiring "permanent" replacements the very next day. Thus, Clark was interviewed for a mechanics position on January 6 and early arrangements were made for his physical, polygraph test, and MVR confirmation. This was done so that Clark could begin working as soon as these postinterview matters were completed. The Company has followed this hiring procedure for the past 5 years. Clark's MVR confirmation was made the same day he was interviewed. He also completed his physical and polygraph test on January 12 and began working at 7:45 a.m. on January 13, approximately 8 hours before the strikers offered to return to work.

<sup>2</sup>The status of the "washers" will be treated separately *infra*.

As for J. Koonce and J. Garibay, their status is somewhat complicated by their starting dates which occurred on January 16 and 19 respectively or 3 and 6 days respectively after the strikers offer to return to work. On the other hand, both had their interviews and MVR confirmations completed and arrangements were made for their physicals and polygraph to be taken before the offer to return to work was made. In Koonce's case, he completed his physical and polygraph test before the strikers offered to return to work. As for Garibay, he appeared for his physical on the morning of January 13 but had to complete his examination the following day because the x-ray machine had become inoperative. It is noted that the Company, through its safety department, arranges for the physical and other postinterview tests at a cost to it of \$150 per person. As such, it tends to support the Respondent's contention that a serious commitment to hire was made subject only to the routine completion of the postinterview checks and tests.

Superintendent Roscoe Stajkovich testified, without contradiction, that he told J. Koonce on January 8 that he would be starting on January 16 with the understanding that he satisfactorily complete the postinterview requirements, i.e., pass his physical. Garibay, unlike Koonce, was employed elsewhere at the time he was hired. Stajkovich was told by Garibay that he had to provide some notice to his employer and therefore the latter was unable to start working until January 19.<sup>3</sup> Koonce voluntarily quit and was subsequently replaced by Carter in June 1987 when the latter was recalled. Garibay was still employed at the time of the hearing.

Having found that Clark, Koonce, and Garibay were hired as permanent replacements, I turn now to consider whether there were openings for which the Respondent was obligated to offer Carter, McClain, and Golden as contended by the General Counsel.

The record disclosed that the Respondent employed eight mechanics immediately before the strike. Of these, six of them became strikers: R. Carter, J. Danhoff, R. Fukar, R. Golden, T. McClain, and J. Morrissey. The other two mechanics, L. O'Connor and J. McCormack, worked during the strike. Danhoff returned to work on January 16 as the building maintenance mechanic with the consent of the Union, although he was not the most senior mechanic. As previously noted R. Clark, J. Garibay, and J. Koonce were hired as permanent replacements. Thus, excluding Danhoff, of the seven remaining pre-strike positions, three were filled by permanent replacements, two positions continued to be held by O'Connor and McCormack. This left two mechanic slots still open at the time the offer to return to work was made for which the Respondent failed to demonstrate any legitimate and substantial business justification. In fact the Respondent's initial written response to the Union immediately after it learned that the strike was over was to confirm that there were mechanic positions open. Thus, Schurer, by telegram stated, in pertinent part:

<sup>3</sup> While *Garibay* testified that he learned that he was hired on January 16, I find that the commitment to hire him was made on January 9 as contended by the Respondent. Thus, *Garibay* also acknowledged that he was interviewed on January 9 and told then that he would be scheduled to take a physical and polygraph test. In the main I found *Garibay's* testimony unreliable. He exhibited poor recall, his responses were often disjointed, inconsistent, and at times incoherent. It is also noted that *Garibay's* name was provided to the Union on January 15 along with other named replacements.

All tank washers have been replaced but three mechanics have not. Please select *three mechanics* [emphasis added] to report to work immediately at commencement of regular shift. [G.C. Exh. 7.]

As noted above, the Union agreed to the Company's choice of Danhoff to fill one of these positions. However, the other two slots were not filled. I reject Schurer's uncorroborated and implausible testimony where he asserted that soon after sending the aforementioned telegram he checked the facts with his staff and discovered that he made a mistake regarding the number of slots open for mechanics. As for Schurer's second telegram which was sent the following day assertedly correcting the mistake, I find its contents ambiguous, self-serving, and more likely in the circumstances of this case sent to afford the Respondent some documentary protection for its refusal to recall strikers. Thus, Schurer's second telegram could be viewed as dealing with washers rather than mechanics or even both groups. There, Schurer merely noted that "[H]e misstated the substantial amount of permanent replacements and the availability of work in view of the limited amount of equipment at the terminal during the strike. (G.C. Exh. 8.) There, Schurer also represented that he would have "all information for review and discussion" at the previously arranged meeting set for the following day. This (the information) proved to be largely illusory.

According to Schurer, there were two positions open and not the three as stated in his first telegram. However, even as to these two asserted openings, one turned out to be illusory. That ostensible position involved the shop foreman classification, a unit job. The record disclosed that at the time of the strike, the shop foreman position was already open and remained open until March, 2 months after the strike ended, when the Respondent hired E. Pietrzak, a new employee. The Respondent told the Union that none of the strikers were qualified to fill that position. In these circumstances, the conclusion is inescapable that the vacant shop foreman's position vis-a-vis the strikers had no relevance as a job opening. Thus, of the three mechanic openings referred to by Schurer in his first telegram, only one, the building maintenance position filled by Danhoff proved to be meaningful.

I also reject Schurer's conclusionary and uncorroborated assertion that the Company learned to operate more efficiently during the strike as a basis for reducing the number of mechanics (Tr. 198-199). It is noted that the strike was of relatively short duration, approximately 10 days. In fact, Kofkin indicated to the Union that the Company had no plans to "decrease the number of positions." (Tr. 124-125.) In these circumstances, I find that the failure of the Respondent to at least notify the Union at the meeting of January 15 and the last bargaining session of February 17 that it had decided to eliminate two mechanic positions tends to militate against Respondent's good faith in dealing with the strikers.

While the Respondent did not hire any new mechanics after the strike, it hired some utilitymen and they performed some of the work previously assigned to the mechanics although the record is unclear as to what extent. The Respondent's treatment of D. Koonce, brother of J. Koonce, as a permanent replacement is another case in point. Schurer testified that D. Koonce, a utilityman, was hired during the strike as a permanent replacement. However, at the time of the strike,

the Company had only one utilityman, R. Taylor, and he worked during the strike. Thus, any reliance by the Respondent on the status of D. Koonce at any time material is misplaced.

The record disclosed that R. Taylor resigned in March (2 months after the strike ended) and that opening was offered to and accepted by Carter. Subsequently, when J. Koonce, a mechanic, resigned, Carter filled that vacated position. In turn, this left open the utilityman position vacated by Carter (previously held by Taylor). As noted previously, the General Counsel contends that the Respondent was obligated to offer that vacated utilityman position to Paul Anderson, James DeMoss, and Ephriem Norwood (all washers) for which they were assertedly qualified.

I find that the General Counsel's position with regard to Anderson and DeMoss has merit but not so for Norwood. In dealing with Norwood first, I find little support for the General Counsel's contention that because washers earn \$11.50 per hour as compared with \$8.50 for utilitymen that it mandates a presumption that they possess the necessary skills or, at least with a little training, to perform satisfactorily as utilitymen. As noted by the Respondent, "[T]he washer job may be arduous, dangerous, hazardous, hot, wet, and unpleasant, all of which could justify higher wages, but that is not relevant to the issue here." (Br. 53.)

The record disclosed that the Respondent maintains one separate seniority list for mechanics and utilitymen and another for washers and that mechanics and utilitymen are separately supervised and work in an area apart from washers. Further, utilitymen must demonstrate mechanical aptitude and skills not required of washers. Thus, utilitymen, unlike washers, inter alia, make safety checks on brakes, repair brakes, repair electrical problems, oil axles, and go on service calls. (R. Exh. 16.) In Norwood's case, aside from some ability to drive a trailer, there is a dearth of evidence reflecting either interest by him or his qualifications, to work as a utilityman. As such I find that the General Counsel has not established on the basis credible record evidence that the Respondent was obligated to offer the slot to Norwood. Cf. *Arlington Hotel Co.*, 273 NLRB 210 (1984) (where the parties stipulated that the unrecalled strikers were qualified to perform the lower paid jobs).

With regard to Anderson, the record disclosed, inter alia, that he worked previously for the Respondent as a utilityman for approximately 12 months under the supervision of Stajkovich. The latter acknowledged at the hearing that Anderson's performance as a utilityman was good. (Tr. 448.) As for DeMoss, Stajkovich admitted that the former had on occasion expressed an interest in doing utility work. According to Stajkovich, he once offered that position to DeMoss prior to the strike but that DeMoss was not interested. Stajkovich also opined that DeMoss was not qualified. Given Stajkovich's admitted offer to DeMoss, I am hardly persuaded and reject this belated assessment. Overall, I found the testimony of Stajkovich to be conclusionary, elusive, and considerably less than forthright as evidenced by his inability to state whether he was serious when he made his offer to DeMoss (Tr. 379). In any event, while DeMoss may have turned down the job prior to the strike, circumstances changed after the strike; he was without a job. See *Arlington Hotel Co.*, supra at 215.

In sum, I find that the Respondent violated Section 8(a)(3) and (1) of the Act with regard to mechanics Roosevelt Carter, Thomas McClain, and Ron Golden<sup>4</sup> and washers Paul Anderson and James DeMoss, as alleged. I shall recommend dismissal of the allegation only insofar as it relates to Ephriem Norwood.

## 2. Whether the Respondent violated Section 8(a)(3) and (5) by giving a wage increase to J. McCormack

Counsel for the General Counsel in his brief urged that I make independent findings that the Respondent violated Section 8(a)(3) and (5) by giving J. McCormack a wage increase to induce him to cross the picket line. The General Counsel relies principally on the testimony of former strikers Paul Anderson and Thomas McClain and a stipulation by the parties regarding changes in McCormack's hourly wage rate. The parties stipulated that McCormack's hourly wage rate, as a new employee in October 1986, was \$10 which was raised to \$12.50 for the week ending January 17, 1987, and thereafter. (Tr. 548.)

Essentially, Anderson and McClain testified that McCormack told them, independently, on the picket line, that the Company offered him a \$2.50 hourly raise to work during the strike.<sup>5</sup> The Respondent objected to this testimony on the basis of relevance and hearsay. In this connection, the Respondent noted that the only substantive amendment made at the hearing was the allegation dealing with the payment to replacements and other employees of a higher wage rate than the Company's last offer to the Union in violation of Section 8(a)(5). (Tr. 336.) As such, the Respondent argues that the amendment did not embrace any 8(a)(3) allegation or otherwise relate to an inducement to cross the picket line.

The General Counsel did not offer the testimony to demonstrate the truth of McCormack's asserted admission that he was given the raise to induce him to cross the picket line but rather to cast doubt on the Company's records. These records erroneously carried McCormack's starting salary at \$12.50 per hour rather than \$10, as stipulated at the hearing. (Tr. 468-469, 480-481.)

In the circumstances of this case, noting particularly that this matter was never specifically alleged nor encompassed by other allegations; that the testimony was not offered for the truth nor subject to connection (McCormack was not called as a witness); that the Respondent raised timely and continuous objections; that the Respondent did not cross-examine regarding such testimony; I find, that this allegation, first made in the General Counsel's brief, was untimely

<sup>4</sup> *Schurer* testified that the Company had added some new equipment and is now looking for a permanent mechanic. (Tr. 438.) According to *Schurer* no offer has been made to fill that opening to any of the former mechanics including *McClain* and *Golden* because the Company had not received "any response from previous attempts [regarding their employment interests]." (Tr. 439.) The record disclosed, however, that neither *McClain* nor *Golden* received a viable offer to be reinstated on a "permanent" basis. (Tr. 288-289; see also R. Exh. 3; Tr. 485-486.) As for former striking mechanics *Morrissey* and *Fukar*, they are not alleged as discriminatees in the complaint and the General Counsel made no claim on their behalf. In this connection, the General Counsel represented that during the investigation of the underlying charges, *Morrissey* and *Fukar* advised the Region "that they would have turned down any offers by Respondent of recall." (G.C. Br. 21.)

<sup>5</sup> I find that this testimony is highly suspect noting, inter alia, that neither witness brought the matter to the General Counsel's attention until the hearing, more than 15 months after the statements were allegedly made.

made, not fully litigated, and should not be entertained.<sup>6</sup> Accordingly, I shall recommend that this untimely allegation be dismissed.

3. Whether the Respondent violated Section 8(a)(3) and (5) by paying new hires and strike replacements a higher wage than its final contract offer to the Union

Deep into the Respondent's case, counsel for the General Counsel amended the consolidated complaint to allege that the Respondent violated Section 8(a)(5) by paying the replacements and prestrike employees (nonstrikers) Taylor, McCormack, and O'Connor "a higher wage rate than the last offer of the company."<sup>7</sup> (Tr. 336.) In his brief, counsel for the General Counsel also contended for the first time that the same conduct additionally violated Section 8(a)(3). (G.C. Br. 28.)

The record disclosed that the Respondent's final offer, as stated in its letter to Wojtczak dated March 21, 1986, provided, inter alia, that new hires in all classifications receive 80 percent of the applicable hourly rate paid other employees. It is undisputed that the Respondent's final offer of March 21, 1986, was implemented on September 28, 1986. The Respondent hired McCormack, O'Connor, and Taylor respectively in October, November, and December 1986. The latter two employees and the strike replacements were hired at the higher prevailing rate paid other employees rather than 80 percent of that rate. McCormack was hired at \$10 or 80 percent of the hourly rate paid other mechanics. As noted previously, McCormack's hourly wage rate was increased to \$12.50 in January 1987.

The Respondent contends that the General Counsel's allegation is based on an erroneous premise that new employees must be paid a maximum of 80 percent of the hourly rate paid other employees in their respective classifications. According to Schurer's uncontradicted testimony, the 80-percent rate represented the "minimum" for new hires; "we could hire them at a higher rate if we wanted to." (Tr. 325.) In support thereof, the Respondent noted, inter alia, that the last collective-bargaining agreement referable to wages underscored "MINIMUM WAGE RATES." (G.C. Exh. 2, art. XXVIII, p. 18.) Schurer explained that new hires were paid over the 80-percent minimum because "it was difficult to get good people at those rates."

I find, that there is virtually no documentary or other probative evidence tending to contradict the Respondent's assertion that it paid new hires including the strike replacements in a manner consistent with its past practice and its final implemented offer. For example, no union representative testified contrary to Schurer insofar as whether the 80-percent figure represented only the "minimum" rate. Compare *Burlington Homes*, 246 NLRB 1029, 1030 (1979), where a clear inference was drawn on testimony establishing that new em-

ployees would start at a lower rate than employees who had completed their probationary period.

As the General Counsel has failed to establish by a preponderance of the evidence that the Respondent paid a higher hourly wage rate to its new hires and replacements in violation of Section 8(a)(3) and (5) of the Act, I shall recommend that these allegations be dismissed.

4. Whether the Respondent violated Section 8(a)(5) by unilaterally changing the fringe benefits bargaining with the Union

It is undisputed that the Respondent never contributed to either the Union's health and welfare fund or the Union's pension fund on behalf of employees McCormack, O'Connor, and Taylor. It is also undisputed that these employees were hired in 1986 after the last collective-bargaining agreement expired and that each of them continued to work during the strike in 1987.

The Respondent argues that the aforementioned individuals were relatively new employees and that the Company simply "overlooked" making payments on their behalf. (Tr. 262; R. Br. 69.) In any event (according to the Respondent), as the aforementioned employees were all hired after the contract terminated any "obligation [for them] ended with the expiration and termination of the agreement." (R. Br. 69.) For reasons noted below, I find that the Respondent's contentions are untenable.

First, I reject the Respondent's effort to discount its failure to make the disputed contributions as an oversight. The short answer is to make those payments. This the Respondent has failed and refused to do even as late as the instant hearing.

As for the collective-bargaining agreement having terminated, it is noted, inter alia, that the contract imposed a continuing obligation on the Respondent to make contributions "during periods when the collective bargaining agreement is being negotiated." (G.C. Exh. 2, art. XVIII, sec. 3(d).) In this connection, it is noted that negotiations for a new contract continued even after the Respondent implemented its final offer. Moreover, the same expired collective-bargaining agreement expressly provided that the Employer's fringe contributions "shall apply to new employees from the date of hire." (Id. at sec. 3(a).)

However, even in the absence of the aforementioned contractual provisions, it has long been held that absent some legal impediment (none shown here), "an employer has a *continuing obligation* [emphasis added] to make contributions to contractual fringe benefit funds *even after the expiration date of the contract* [emphasis added]." *Chemung Contracting Corp.*, 291 NLRB 773 at 775 (1988), citing *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970), and *Buck Brown Contracting Co.*, 272 NLRB 951 (1984). While the record disclosed that a lawful impasse existed at the time that Respondent's final offer was implemented in September 1986, it is noted that the Respondent continued to make pension, health and welfare contributions for then-existing employees under the expired contract. The Respondent continued to make these fund contributions (except for McCormack, O'Connor, and Taylor) until the strike in January 1987. While it is not contended that the Respondent was obligated to make fringe contribution payments for the strikers, it failed, as noted above, to make such payments for McCormack, O'Connor, and Taylor although these employees (as noted above) continued to work during the strike. The Respondent also continued to make health, welfare, and

<sup>6</sup>Even if timely alleged, this did not relieve the counsel for the General Counsel of his affirmative burden of establishing prima facie unlawful motivation, to wit, that the raise was given as an inducement to cross the picket line. See generally *Wright Line*, 251 NLRB 1083 (1980); cf. *Frank Black Mechanical Services*, 271 NLRB 1302, 1316 (1984).

<sup>7</sup>At times, the General Counsel appeared to argue that Taylor, McCormack, and O'Connor were not permanent replacements (Tr. 316-320). However, the record clearly disclosed that their status as prestrike employees was never in dispute.

pension contributions on behalf of reinstated striker J. Danhoff (Tr. 262).

Given these circumstances, I find no basis for treating the bargaining impasse of September 1986, as the type of "legal impediment" to justify the Respondent's failure to make the disputed fund contributions. Accordingly, I find that the Respondent violated Section 8(a)(5) in failing to make such payments vis-a-vis McCormack, O'Connor, and Taylor, as alleged.

5. Whether the Respondent bargained in bad faith since on or about February 17, 1987, by offering regressive and onerous bargaining proposals to the Union in violation of Section 8(a)(5)

It is alleged that the Respondent's contract proposals at the February 17, 1987 bargaining session were offered in bad faith in violation of Section 8(a)(5). The General Counsel acknowledged that regressive proposals, as here, by themselves, do not establish bad faith, citing *Barry-Wehmiller Co.*, 271 NLRB 471 (1984), where no violation was found. According to the General Counsel, the instant case is "very similar" to the cited case with one vital and fundamental difference: Here, unlike *Barry-Wehmiller Co.*, the Respondent committed serious unfair labor practices.

I find, contrary to the General Counsel, that while certain factors are common to both cases, the differences far outweigh any similarities. In both cases, the employer offered less attractive proposals than previously made, after having successfully weathered a strike. However, there, the similarities end. In the instant case, the Respondent's final offer was made approximately 11 months before it reduced that offer and 15 months after the previous contract terminated. The Respondent's new proposal contained, inter alia, a new contract term commencing on the execution date rather than on the date the last contract expired (as urged by the Union). The temporal sequence in *Barry-Wehmiller Co.*, bares little resemblance. There, the final offer came approximately 1 month after the most recent contract expired and the revised proposals came approximately 1 month later. Moreover there, unlike the instant case, the employees were still on strike when the revised proposals were offered.

As for the alleged unfair labor practices relied on by the General Counsel, I find, in large part, that they had not been established. For example, I have found for reasons discussed previously, that the General Counsel failed to establish that McCormack was given a wage increase to induce him to cross the picket line. Further, the General Counsel failed to demonstrate that the Respondent paid striker replacements a higher hourly wage rate than provided for in the Company's final offer. Significantly, the striker replacements were not paid more than the strikers.

However, even as to those allegations found to be meritorious, the General Counsel failed to establish a nexus between such misconduct and the Respondent's bargaining posture, vis-a-vis a new contract. In other words, contemporaneous misconduct away from the bargaining table by itself, falls short of establishing bad faith at the bargaining table. See, e.g., *Challenge-Cook Bros.*, 288 NLRB 387 (1988).

There are still other significant factors which tend to militate against the General Counsel's allegation. Thus, it is undisputed that the Respondent explained or discussed each revision contained in the new proposal at the February 17 bargaining session.

As noted above, given the fact that some 15 months had elapsed from the expiration date of the last contract, the Respondent now wanted a new full "three-year contract period from the date of signing." (R. Exh. 9.) In the circumstances of this case, I cannot find that the aforementioned proposal is so impermissibly regressive as to manifest bad faith on the part of the Respondent. See, e.g., *Massillon Community Hospital*, 282 NLRB 675 (1987). As for the elimination of the union-security provision (another change), the Respondent explained that this proposal was made out of concern for its hired replacements. It is noted that the "existence of such a clause in previous contracts does not by itself obligate the parties to include it in successive contracts." *Challenge-Cook Bros.*, supra at 388.

On the other hand, the Respondent left alone some other key areas at the February 17 meeting, i.e., wages were not lowered and remained the same. Significantly, the revisions were merely proposals and subjects for consideration. They were not offered on a take-it-or-leave-it basis. The Union, for its part, made no counterproposals. In fact, for many months the Union made no effort to contact the Company after it received a final offer. It is not alleged nor does the record disclose that the Respondent bargained in bad faith over the many months preceding the February 17 session.

In view of the foregoing and on the total state of this record, I find that the General Counsel has failed to demonstrate that the Respondent's proposals at the February 17 meeting were offered in bad faith. Accordingly, I shall dismiss this allegation.

6. Whether the Respondent withdrew recognition from the Union in violation of Section 8(a)(5)

It is alleged in the amended complaint that on or about April 20, 1987, the Respondent withdrew recognition from the Union. While the allegation is denied in the Respondent's answer, the record clearly disclosed, and I find, that the Respondent refused to continue to recognize the Union as the exclusive collective-bargaining representative of the unit employees involved, as alleged. Thus, counsel for the Respondent, in his position paper to the NLRB Regional Office regarding other 8(a)(5) allegations, including a failure to provide information, stated in pertinent part as follows:

The company has recently reviewed the request made by the charging party for information. . . . Although the company never refused to provide the information and indeed offered to provide it, it is now a fact that this union no longer represents the majority of employees in the unit. The company has a good faith doubt about the majority status of the [Union] and decided in the past few weeks not to provide it any information unless it demonstrate majority status. [G.C. Exh. 9, emphasis added.]

In *Hajoca Corp.*, 291 NLRB 104 (1988), the Board noted that in *Station KKHI*, 284 NLRB 1339 (1987), it had recently reaffirmed long-standing legal principles regarding the presumption of a collective-bargaining representative's majority status and the circumstances in which that status may be challenged. In *Station KKHI*, the Board stated as follows:

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys [a] majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishe[d] to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain. [Id. at 1340.]

Similarly, there is an irrebuttable presumption regarding the Union's majority status during the term of a collective-bargaining agreement; which, at its expiration may be rebutted by either of the two grounds described above thereby permitting the Employer to withdraw recognition. See *Hajoca Corp.*, supra at 105 and cases cited therein. In either case, however, for the challenge to the Union's majority to be entertained, it must come in a context free of unfair labor practices. See, e.g., *KBMS, Inc.*, 278 NLRB 826, 846 (1986); *Robertshaw Controls Co.*, 263 NLRB 958, 959 (1982).

In the instant case, the Respondent failed to demonstrate either that the Union in fact lost its majority status or that it had a reasonably grounded good-faith belief on objective considerations that the Union no longer represented a majority. First, it is noted that the Respondent relied largely on factors expressly rejected by the Board. In this regard, counsel for the Respondent noted that of 11 employees in the poststrike complement, 3 of them were prestrike employees who had crossed the picket line and another 7 employees were hired as permanent replacements and they too had crossed the picket line. (R. Br. 71.) However, as observed by the Board recently, "the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative." *Station KKHI*, supra at 1344; see also *Hajoca Corp.*, supra at 105. Here, the Respondent offered no independent or probative evidence reflecting any opposition to the Union on part of the striker replacements.

As for the three nonstriking employees, the Board has long observed that their nonparticipation in a strike does not demonstrate that they oppose the union as their bargaining representative. See *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988). The only other evidence of union rejection by the nonstriking employees was a union resignation letter written by McCormack and obtained by the Company under questionable circumstances. In any event, even counting McCormack's resignation letter as reflecting his opposition to the Union, the Respondent still falls far short of satisfying its burden of showing a good-faith belief that the Union lost its majority.<sup>8</sup> Moreover, any asserted good faith must be dis-

counted by other findings (previously discussed) of contemporaneous misconduct, including the Respondent's unlawful failure to reinstate a number of the strikers.

Counsel for the Respondent also argued that in the "totality of the picture," the "Union's long-standing indifference to bargaining" or "at best," its "lackluster" interest in negotiations, justified the Respondent's decision to question the Union's representation status. (R. Br. 71-72.) The record disclosed that the last bargaining session was conducted on February 17, 1987. At that session, the Union requested and was promised information with regard to the replacements and the Company's health and welfare pension plans. The Union's majority status was not questioned at any time prior to and including that last bargaining session. Thereafter, the Union continued to press for this information. It is undisputed that the Union's attorney called Kofkin, the Respondent's attorney, to remind him that the Union wanted that information. In the circumstances of this case, I reject the Respondent's contention regarding the Union's action or inaction in negotiations as a basis for questioning the Union's representative status as without record support.

In view of the foregoing and on the record as a whole, I find that the Respondent has not established that the Union lost its majority nor that the Respondent entertained any such good-faith belief. Accordingly, I find that the Respondent withdrew recognition from the Union in violation of Section 8(a)(5), as alleged.

7. Whether the Respondent violated Section 8(a)(5) by not providing relevant information as requested by the Union

It is undisputed that at the February 17 bargaining session, the Union requested, and the Respondent promised, to furnish the Union with the names and addresses of the unit employees and information pertaining to Respondent's insurance, hospital and pension plans, as well as copies of those plans. (R. Br. 44-49; Tr. 249.) According to Schurer, he intended to comply fully with the Union's request over the next 2 or 3 weeks but subsequently decided not to because of an evolving doubt as to the Union's majority status. (Tr. 251.)

For reasons noted previously, I have found that any professed doubt by the Respondent concerning the Union's majority was not predicated on objective considerations or made in good faith. It is also noted that the Respondent does not deny that the requested information is relevant.

In view of the foregoing and in the total circumstances of this case, I find that the Respondent is obligated to furnish the requested information to the Union, as alleged. See, e.g., *Massillon Community Hospital*, 282 NLRB 675 (1982). Accordingly, I find that the Respondent, by failing to furnish such relevant information to the Union, on request, thereby violated Section 8(a)(5) of the Act, as alleged.

8. Whether the Respondent denied access to the Union to the Respondent's premises in violation of Section 8(a)(5)

Peter Dowd, the Union's attorney, testified that at the February 17, 1987 bargaining session, he asked the Respondent's

<sup>8</sup>As such, I find it unnecessary to discuss more fully the circumstances of McCormack's letter except to note that it was obtained from him by the Company only after considerable prodding. The Respondent also noted that only Carter responded to its March 11, 1987 letter to the former striking mechanics about an opening for a utility position. (R. Exh. 3.) The record disclosed, inter alia, that the utility position was a lesser job which also paid less. Further, there was only one such position available at the time of the letter and Carter was the most senior employee. In the circumstances of this case, even if the unreinstated strikers subsequently obtained other employment, without more,

I reject the Respondent's position that they had lost interest in the Union or future employment with the Respondent.

representatives to permit Wojtczak "to meet with the employees at the Company's facilities" to discuss the Respondent's new proposal. (Tr. 93.) According to Dowd, the Respondent replied that it was not "appropriate . . . if the Union wanted to meet with people . . . they could find their own location, contact the people and set up a meeting." (Tr. 94.)

According to Schurer, the Company merely denied permission to the Union to conduct a "meeting" of all the employees at the same time at its premises. (Tr. 268, 306-307.) Schurer's testimony, in part, was corroborated by Dennis, although it is noted that the latter's recollection was admittedly limited. Dennis also testified, without contradiction, that the Union had never conducted "group meetings on Company property." (Tr. 410.)

The expired collective-bargaining agreement expressly provided union access as follows:

Accredited representatives of [the Union] shall be permitted to enter the shop of the Company for business purposes during day or night shifts. [G.C. Exh. 2, art. XXII, sec. 2.]

There is no showing, nor is it contended, that the Union had ever been denied access to the Respondent's facility prior to February 17, 1987. Dowd testified that Wojtczak told him that he had visited the facility "regularly and frequently." (Tr. 106.) The record also disclosed that on January 15, 1987, 2 days after the strike, the Respondent invited Wojtczak to visit the facility and gave him access to look around. (Tr. 104.)

In these circumstances, contrary to the General Counsel, I am unpersuaded and reject the assertion that the Respondent departed from past practice or otherwise improperly denied access to the Union on February 17. It is noted that Dowd's testimony on this subject is largely conclusionary, ambiguous, and without corroboration. At best, the circumstances dealing with union access on February 17 was ambiguous. On the other hand, the record clearly disclosed that at least from on or about April 20, 1987, the Company admittedly denied access. Thus, by letter dated April 20, 1987, Kofkin wrote to the Board agent, *inter alia*, "The Company does not believe the union represents a majority of its employees in an appropriate unit and thus has no obligation . . . to permit this union onto its premises." (G.C. Exh. 9, p. 3.)

Having previously found that the Respondent was obligated to continue to recognize and bargain with the Union, I find no justification for its denial to the Union of appropriate access, consistent with past practice, to its premises to conduct union business. Accordingly, I find its refusal and failure to provide such access is violative of Section 8(a)(5) of the Act, as alleged.

#### CONCLUSIONS OF LAW

1. The Respondent, Transport Service Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees in the bargaining unit, namely Foreman or Head Mechanic, Automobile Machinist, Mechanic, Welder, Painter, Skilled Tireman, Helper, Truck, Tractor and Tank Cleaners and Apprentices coming under the jurisdiction of Automobile, Mechanics Local No. 701, IAM and AW, AFL-CIO, 133 S. Ashland Avenue, Chicago, Illinois 60607; but excluding office clerical employees, guards, and supervisors as defined in the Act.

4. At all material times, the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) for all the Respondent's employees in the unit described above.

5. By unilaterally ceasing to make contributions to the Union's pension and welfare funds on behalf of certain unit employees who continued working for the Respondent during a strike, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to furnish relevant information as requested by the Union, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By departing from past practice in denying the Union access to the Respondent's premises, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit described above, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. By failing to recall certain former striking employees, the Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

10. The aforesaid unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The General Counsel has not established by a preponderance of the evidence that the Respondent has otherwise violated the Act as alleged.

#### THE REMEDY

Having found that the Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make contributions into the pension and health and welfare funds included in Respondent's contract with the Union which contract terminated on August 23, 1985, on behalf of certain members of the bargaining unit who had continued to work during the strike, I shall recommend that the Respondent make all pension, health and welfare contributions in the aforementioned funds which have not been paid and which would have been paid but for the unlawful conduct found herein, and continue such

payments until such time as the Respondent negotiates in good faith with the Union to a new contract or impasse is reached. See *Antonio's Restaurant*, 246 NLRB 833 (1979); see also *KBMS, Inc.*, 278 NLRB 826, 851 fn. 68 (1986).

Having found that the Respondent additionally violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union as the exclusive collective-bargaining representative for the unit, and, concomitantly, by unlawfully denying the Union access to its premises to conduct business and by unlawfully refusing to furnish the Union relevant information as requested, I shall recommend that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative for the unit concerning terms and conditions of employment. Further, I shall recommend that the Respondent provide access to the Union to the Company's premises to conduct union business and, forthwith, to furnish the Union, on request, all relevant information including the names and addresses of all unit employees, and information pertaining to Respondent's insurance, hospital and pension plans, and copies of those plans.

Having also found that the Respondent violated Section 8(a)(3) and (1) of the Act by not timely reinstating former strikers Roosevelt Carter and James DeMoss,<sup>9</sup> and not at all

<sup>9</sup>The record disclosed that *Carter*, a mechanic, returned to work as a utilityman on March 16, 1987, and subsequently, on June 8, 1987, he was re-

instating former strikers Thomas McClain, Ron Golden, and Paul Anderson, I shall recommend that the Respondent offer McClain, Golden, and Anderson immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, dismissing, if necessary, any employee hired after January 13, 1987, to replace them and make them whole as well as Carter and DeMoss for any loss of pay by reasons of its refusal to timely reinstate them.<sup>10</sup> *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found, inter alia, that the Respondent's withdrawal of recognition was not grounded in good faith and that it otherwise engaged in serious contemporaneous misconduct including a failure to reinstate strikers under *Laidlaw* principles, I find that a broad cease-and-desist order is necessary. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

instated to his former mechanic position; *DeMoss* was reinstated to his former washer position on or about June 15, 1987. (Jt. Exh. 2.)

<sup>10</sup>I recommend that the determination of the precise dates on which the aforementioned former strikers should have been reinstated be left to the compliance stage of this proceeding. See, e.g., *Challenge-Cook Bros.*, supra at 390 fn. 8.